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8 UNITED STATES DISTRICT COURT
9 WESTERN DISTRICT OF WASHINGTON
10 AT TACOMA

11 RAFAEL RIVERA,

12 Petitioner,

13 v.

14 JEFFREY A. UTTECHT,

15 Respondent.

CASE NO. C11-5693 RJB

ORDER ADOPTING REPORT AND
RECOMMENDATION DENYING
PETITION FOR WRIT OF HABEAS
CORPUS

16 This matter comes before the Court on the Report and Recommendation of Magistrate
17 Judge J. Richard Creatura. Dkt. 20. The Magistrate Judge recommends that Petitioner's petition
18 for writ of habeas corpus pursuant to 28 U.S.C. § 2254 be dismissed and that a certificate of
19 appealability be denied. *Id.* Petitioner has filed objections to the Report and Recommendation.
20 Dkt. 23. The Court has considered the relevant documents and conducted a *de novo* review of
21 the record.

22 **INRODUCTION AND BACKGROUND**

23 Petitioner was convicted by jury trial of five counts of child molestation. The Thurston
24 County Superior Court sentenced him to five concurrent sentences of 198 months to life. After

1 pursuing state remedies, Petitioner filed a petition for writ of habeas corpus under 28 U.S.C. §
2 2254 with this Court. Dkt. 5.

3 Petitioner raises eight grounds for relief: (1) Fourth Amendment exclusionary rule; (2)
4 Deliberate withholding of evidence; (3) Denial of ability to present witnesses; (4) Ineffective
5 assistance of counsel; (5) Newly discovered evidence; (6) Right to confront his accusers and
6 present a defense; (7) Compulsory process; and (8) Due Process right to fair trial. Dkt. 5.

7 The Magistrate Judge concluded that an evidentiary hearing was unnecessary as
8 Petitioner's claims rely on established rules of constitutional law. Further, there are no factual
9 issues that could not have been previously discovered by due diligence. Finally, the facts
10 underlying petitioner's claims are insufficient to establish that no rational fact finder would have
11 found him guilty of the crime. Dkt. 20 p. 7.

12 The Petitioner agreed with Respondent that the grounds for relief (5) and (8) were
13 procedurally barred and they were not addressed by the Magistrate Judge. Dkt. 12 p. 8; Dkt. 17
14 p. 2; Dkt. 20 p. 6.

15 The claim of ineffective assistance of counsel was also found to be procedurally barred.
16 Dkt. 20 pp. 12-14. In the alternative, the Magistrate Judge considered the issue on the merits
17 and found Petitioner failed to show that counsel was ineffective or that the decision of the state
18 court was objectively unreasonable. Dkt. 20 pp. 14-18. The Magistrate Judge found remaining
19 five grounds for relief do not meet the standard for habeas corpus relief. Dkt. 20 pp. 7-11, 19-21.

20 The Magistrate Judge further found that Petitioner was not entitled to a certificate of
21 appealability because he failed to demonstrate that jurists of reason could disagree with the
22 district court's resolution of his constitutional claims or that jurists could conclude the issues
23 presented are adequate to deserve encouragement to proceed further. Dkt. 20 p. 20.

1 Petitioner objects to all adverse rulings in the Report and Recommendation, restating his
2 prior arguments. Dkt. 23.

3 **FOURTH AMENDMENT CLAIM**

4 It is not necessary that a petitioner actually litigate the Fourth Amendment claim in state
5 court. Habeas corpus review of such claims is barred so long as the petitioner had the
6 opportunity to litigate the claims in state court. *Stone v. Powell*, 428 U.S. 465, 482 (1976).
7 Despite Petitioner's protestations to the contrary, the record reflects that Petitioner had the
8 opportunity to challenge evidence based on a Fourth Amendment challenge at trial and on
9 appeal. The first ground for relief is dismissed as barred from habeas review.

10 **WITHHOLDING EVIDENCE CLAIM**

11 The Magistrate Judge found, and the record demonstrates, that the prosecution did not
12 hide or fail to disclose evidence. The ruling of the state court regarding ground for relief number
13 two is not contrary to, and does not involved an unreasonable application of, clearly established
14 federal law, as determined by the Supreme Court. Further, the decision is not based on an
15 unreasonable determination of the facts in light of the evidence presented to the state courts.
16 This ground for relief is denied.

17 **ABILITY TO PRESENT WITNESSES**

18 The Magistrate Judge found Petitioner's assertions that he was denied the ability to
19 present witnesses patently without merit. The record supports this conclusion. The request for
20 relief in ground three is denied.

21 **INEFFECTIVE ASSISTANCE OF COUNSEL**

22 The Magistrate Judge found that Petitioner failed to fairly present his ineffectiveness
23 claim to the state courts and the claim is now procedurally barred. Dkt. 20 pp. 12-14. In the
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1 alternative, as thoroughly reviewed and detailed in the Report and Recommendation, the
2 Magistrate Judge found that Petitioner failed to show that counsel was ineffective or that the
3 decision of the state court was objectively unreasonable. Dkt. 20 pp. 14-18. Petitioner's
4 objections to this finding are unpersuasive. The claim of ineffective assistance of counsel is
5 denied.

6 **RIGHT OT CONFRONT ACCUSERS AND PRESENT A DEFENSE**

7 As detailed in the Report and Recommendation, Petitioner's accusers all testified and
8 were subject to cross examination and Petitioner's ability to subpoena witnesses was not limited.
9 Dkt. 20 p. 19. This ground for relief is without merit and denied.

10 **RIGHT TO COMPULSORY PROCESS**

11 Petitioner was not denied compulsory process. His counsel indicated to the trial court
12 that the defendant was the only witness the defense was calling. Dkt. 20 p. 20. Petitioner could
13 have called other witnesses if he so chose. None of the rulings made by the state court violate
14 clearly established federal law and the decision was based the evidence presented to the state
15 courts.

16 **EVIDENTIARY HEARING**

17 Petitioner objects to the lack of an evidentiary hearing on his Fourth Amendment and
18 ineffective assistance of counsel claims. Petitioner's claims are governed by established rules of
19 constitutional law and the facts underlying Petitioner's claims are insufficient to establish that no
20 rational fact finder would have found him guilty of the crime. An evidentiary hearing is not
21 necessary to decide this case.

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CONCLUSION

The Court, having reviewed the Report and Recommendation of Magistrate Judge J. Richard Creatura, Objections to the Report and Recommendation, and the remaining record, does hereby find and **ORDER:**

- Dated this 25th day of June, 2012.

ROBERT J. BRYAN
United States District Judge